No. 03-1600

Supreme Court, U.S.
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In The

# Supreme Court of the United States

DOMINIQUE K. GANTT,
*Petitioner,*

v.

SECURITY, USA, INCORPORATED,
Corporate Office
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Respondent, Security, USA, Inc. ("Security USA"), a privately owned and operated company that contracted with the federal government to provide security services to a federal building, is subject to liability for alleged Fifth Amendment violations of its employees because it was performing security services for a federal building.

2. Whether the U.S. Court of Appeals for the Fourth Circuit erred, as a matter of law, in affirming summary judgment in favor of Security USA on the claim filed by Petitioner, Dominique Gantt ("Gantt"), for intentional infliction of emotional distress resulting from her alleged abduction, assault, and rape at the hands of a non-employee, and in denying summary judgment to Security USA for the portion of such claim related to her assignment to an outside security post prior to such abduction.

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## STATEMENT OF THE CASE

*Factual Background*[1]

Security USA is a privately owned and operated company, which contracted with the General Services Administration ("GSA") to provide security services to the Internal Revenue Service ("IRS") building in Lanham, Maryland. (Pet. Brief at 1-2). Gantt was employed by Security USA as a security guard during November and December of 1996, the relevant time period in this case. (Pet. Brief App. (hereinafter "App.") at 2a-3a). On November 6, 1996, Gantt obtained a protective order barring her ex-boyfriend, Gary Sheppard, from having any contact with her. (App. at 3a). Sheppard was not an employee of Security USA. *Id.* Gantt alleges that she told her employer, Security USA, about the order. *Id.*

Gantt says that one of her direct supervisors, Angela Claggett, knew Sheppard personally, and the reasons the protective order was imposed. (Pet. Brief

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[1] This summary of the facts is excerpted from the facts as they were presented to the Fourth Circuit, which reviewed the district court's granting of Security USA's motion to dismiss Gantt's constitutional claim and the granting of Security USA's summary judgment motion on the intentional infliction of emotional distress claim. Thus, as required, Gantt's version of the events is accepted for purposes of this appeal only. Security USA, however, does not concede that Gantt's allegations are true and, in fact, disputes them.

at 3). Nevertheless, according to Gantt, on December 7, 1996, Claggett transferred a telephone call from Sheppard to Gantt, and assigned her to an outside post at the IRS building. (App. at 4a-5a). Gantt was stationed at the post for approximately an hour when Sheppard arrived at the IRS building and abducted Gantt at gunpoint. (App. at 5a-6a). Gantt alleges that Claggett did not immediately call the police. (Pet. Brief at 5). After several hours, Sheppard surrendered to police. (App. at 7a). Sheppard was convicted of kidnapping, first degree rape, and violation of the restraining order, and is currently serving twenty years in state prison.

*Procedural History*

Slightly less than three years after the events described above, Gantt filed her initial suit against Security USA and others, claiming violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* ("Title VII"), Maryland law and the Fifth Amendment of the U.S. Constitution. In May of 2000, Gantt filed her First Amended Complaint ("Complaint") in the United States District Court for the District of Maryland. In her Complaint, Gantt alleged four counts against her former employer, Security USA: negligence, gross negligence and reckless disregard for human life and safety (Count I); "sexual harassment/hostile work environment" (Count II); intentional, reckless and/or negligent infliction of emotional distress (Count III); and negligent hiring, training, retention, supervision, discipline and entrustment (Count IV). Security USA filed a motion

to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure with respect to all Counts.

On January 8, 2001, the district court granted Security USA's motion to dismiss with respect to Counts I, II,[2] and IV, but denied the motion to dismiss with respect to Count III, finding that Gantt's allegations, as pled, were sufficient to state a claim for intentional infliction of emotional distress.

Following discovery on the emotional distress claim (Count III), both parties moved for summary judgment. On December 4, 2002, the district court denied Gantt's motion for summary judgment and granted Security USA's motion for summary judgment, dismissing Count III, and thus, the entire case. Gantt appealed to the Fourth Circuit, challenging the district court's dismissal of her sexual harassment claim (Count II) and her claim of intentional infliction of emotional distress (Count III).

The Fourth Circuit concluded that the district court properly dismissed Gantt's constitutional sexual harassment claims against Security USA. The court determined, in accordance with *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), "[i]ndisputably, [Security USA] is a private entity; therefore no *Bivens* claim lies against the company." 356 F.3d at 552; *see*

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2 Count II of Gantt's Complaint alleged only a violation of the "equal protection guaranties of the due process clause of the Fifth Amendment of the United States Constitution." *See* App. at 60a. Nevertheless, Gantt asserted to the Fourth Circuit, and continues to assert before this Court, that her claim under Count II also arises under the Fourteenth Amendment and 42 US.C. § 1983 ("§ 1983").

*also Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The Fourth Circuit also disregarded Gantt's claims based on the Fourteenth Amendment and § 1983 because they were raised for the first time on appeal, thus they were not properly before the court. Moreover, the Fourth Circuit noted that even if the issues were properly raised and preserved for appeal, the Gantt failed to produce sufficient evidence that Security USA was a "state [as opposed to federal] actor." *Id.* at 552 n. 1.

Turning to the emotional distress claim, the Fourth Circuit affirmed the grant of summary judgment for Security USA on the emotional distress claim growing out of the abduction and rape by Sheppard; however, the court reinstated Gantt's claim based on the alleged intentional assignment of Gantt to an outside post at the IRS building and the alleged emotional distress suffered by Gantt prior to Sheppard's arrival. The court thus reversed and remanded to the district court for further proceedings on that portion of the claim.

Gantt is now seeking the review of the United States Supreme Court of her sexual harassment claim, which she has categorized as either a Fifth or Fourteenth Amendment violation. She is also seeking review of the Fourth Circuit's decision to uphold summary judgment in Security USA's favor on her claimed emotional distress resulting from the abduction, assault, and rape by Sheppard.

## SUMMARY OF ARGUMENT

This Court should leave undisturbed, by denying certiorari, the decision below of the Fourth Circuit. Gantt has not provided this Court with any valid reason for granting her petition for certiorari.[3] She has failed to allege any reason for invoking this Court's certiorari jurisdiction beyond her contention that the Fourth Circuit erred in its decision of the case. Gantt ignores Supreme Court Rule 10[4] and fails to identify any reason comparable to the reasons set forth therein for this Court to exercise its discretion and grant a writ of certiorari. At best, Gantt claims that the lower courts made erroneous findings as to undisputed facts and misapplied rules of law. Rule 10 makes clear that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This is not one of those rare cases where a

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[3] In fact, much of Gantt's quite lengthy petition is merely her arguments on the substantive merits of her claims. She has not adequately raised or addressed reasons why these claims are worthy of review by this Court.

[4] Supreme Court Rule 10 states, in pertinent part: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." The Rule then continues by enumerating a non-exhaustive, but nonetheless relevant, list of reasons for review that the Court regularly considers. This list includes various judicial conflicts, an issue of national importance, or an exercise of supervisory power to review a lower court decision that severely departs from the "accepted and usual course of judicial proceedings."

petition should be granted. Gantt's request for a writ of certiorari should be summarily denied.

## REASONS TO DENY THE PETITON

### I. Gantt has failed to identify an issue of national importance worthy of this Court's review.

Review by this Court on writ of certiorari is a matter of judicial discretion, which will be granted only when there are special and important reasons for review. SUP. CT. R. 10. One of the factors considered by this Court is whether the issues presented are novel. *See, e.g., Times Film Corp. v. Chicago*, 365 U.S. 43 (1960) ("The petition for certiorari presents novel questions of importance . . ."). Additionally, this Court does not sit for the benefit of any particular litigant. *See Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing"). There must be some issue of national importance. *Id.*

In this case, the ruling arose in an uncommon factual context, did not establish any rule of law affecting other cases and did not address an important issue of federal decisional, statutory, or constitutional law. It therefore does not meet the criteria for review, as found in Rule 10.

Nevertheless, in her effort to obtain review by this Court, Gantt has attempted to characterize the issue of whether an employer can be held liable for the

for the harassment of its employees by non-employees and the imposition of civil liability for the allowance or facilitation of workplace violence against women as novel issues of national importance. (Pet. Brief at i, ii). However, whether these are issues of national importance is irrelevant to the grant or denial of review in this case.

The constitutional issues presented to the Court concern only whether a private employer can be considered a government actor, and thus be subject to claims for Fifth Amendment violations. This is an issue that has been addressed, and resolved, by this and other courts, without resulting conflict. *See* Argument II, *infra*. It is therefore not a novel issue in need of addressing by this Court at this time.[5]

Gantt's attempt at converting the issue of whether a private security company is subject to the Fifth Amendment as a "government actor" to an issue of national importance is without support or merit. Gantt asserts that "[t]he United States Department of

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[5] As to the broader issue of employer liability for employee harassment by a non-employee, the lower courts in this case did not dispute that accepted legal principle. Thus, Gantt's contention that because the Supreme Court has yet to address such issue, it is "novel" and worthy of review must fail. Gantt herself notes that all courts that have addressed the issue have come to the same conclusion, i.e., employer may be liable for the harassment of employees by non-employees in certain circumstances. (Pet. Brief at 10). Thus, there is no split of authority and review by this Court is unnecessary.

Homeland Security is offering, and will continue to offer, many new contract to private security companies . . ." (Pet. Brief at iii). Gantt further claims that "[p]rivate security companies are increasingly assuming the public function of policing." *Id.* Thus, Gantt's expansive factual contention is that there is a growing trend towards privatization of security forces in general. However, Gantt fails to cite any authority for this broad claim.

Contrary to Gantt's contentions, since the events of September 11, 2001, the converse holds true. In light of current national security concerns, policymakers are *withdrawing* support for new privatization projects and shifting that support toward increase *federalization*.[6] With the creation of the Department of Homeland Security, the federal government is asserting more direct control over security functions, and persons carrying out these functions are increasingly federal

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[6] *See e.g.*, Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(a), 115 Stat. 597, 597 (2001) (codified in scattered sections of 49 U.S.C.; 5 U.S.C. §§ 5313, 8331; 26 U.S.C. § 9502; 31 U.S.C. § 1105) (providing a detailed and comprehensive scheme under which the federal government will exert greater control over airport security, and creates a new federal workforce to implement the security scheme); Ellyn Ferguson, *Michigan Lawmakers Vote for Airport Security Bill*, Gannett News Service (Nov. 16, 2001) (quoting Representative Vernon J. Ehlers as saying "[t]he major gain in the bill (the bill that became the Aviation and Transportation Security Act) is that we have federal control of the (security) process.")

employees.[7] In fact, the executive branch most recently proposed a complete federalization of all security forces at the nation's nuclear facilities.[8]

This increased movement toward federalization rather than privatization of security forces refutes Gantt's argument that there is an increased need to "clearly set forth the legal responsibilities of . . . private companies . . . performing a government function." (Pet. Brief at iii). In the security context, Congress and the Executive through the political process have begun to assume "the legal responsibilities . . . to hire, train, and manage their employees in a manner consistent with the responsibilities of performing a government function." *Id.*

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[7] *See* TSA Begins the Federalization Process at More Airports *at* http://www. dot.gov/affairs/tsa5802.htm (July 15, 2002) (last visited June 23, 2004); *see also* Air Marshall Program Could Create Thousands of New Federal Jobs *at* http://www.govexec.com/dailyfed/0901/092501g3.htm (September 25, 2001) (last visited June 23, 2004) (reporting that Transportation Secretary Norman Mineta estimates that new security measures will require an increased federal expense of $1.8 billion and will likely add 28,000 federal employees to the payroll).

[8] *See* Energy Department Moves to Boost Security at Nuclear Labs *at* http://www.govexec.com/dailyfed/0504/0501004gsn1.htm (May 10, 2004) (last visited June 23, 2004) (reporting on Energy Secretary Spencer Abraham's speech in Aiken, South Carolina where the Secretary announced plans to federalize security forces at nuclear plants and labs and even proposed the creation of a federal special operations force to act as a counter-terrorism strike force).

Even if this Court does accept the proposition that there is an issue of national importance, this case presents a poor vehicle for addressing that issue. Gantt claims that the issue of private security companies assuming public function of policing is "timely" under the circumstances in this post-9/11 society. (*See* Pet. Brief at iii). Although Security USA contends, and supports its contention, that this is fact not true, whether it is true, and whether it presents an issue for review by this Court is irrelevant. The events that gave rise to the causes of action asserted by Gantt occurred in 1996, well before September 11, 2001. Thus, the facts of this case bear no relation to the state of society post-9/11. The importance of Homeland Security increasing private contracting of security details to vulnerable locations is not adequately presented by this case, and cannot support a grant of certiorari.

Since Gantt fails to raise any nationally important issue with respect to her Fifth Amendment claim, or any other valid reason upon which to grant review of her case, her petition for certiorari should be denied.

## II. There is no need for this Court to "clarify" its holding in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), that *Bivens* claims are not available against private companies.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), this Court created a cause of action for damages against federal officers who violate an individual's Fourth Amendment rights. In *Correctional*

*Services Corp. v. Malesko*, 534 U.S. 61 (2001), this Court ruled that *Bivens* should not be extended to allow constitutional suits against private companies performing contracts for the federal government. Gantt claims that this case "offers the Court the opportunity to clarify its holding in [*Malesko*]." (Pet. Brief at iv.) Without citing any authority, Gantt asserts that "[l]ower courts are currently unclear as to whether how extensively [sic] *Malesko* has limited *Bivens*." (*Id.*)

Gantt's invoking of *Malesko* as a basis for granting certiorari is misplaced for several reasons. First, Gantt has not asserted, much less substantiated, that the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court [i.e. *Malesko*]." SUP. CT. R. 10(c). In fact, Gantt seems to agree that the Fourth Circuit's interpretation of the ruling in *Malesko* was correct. Gantt merely argues that the Fourth Circuit "misunderstood the *timing* of the district court's dismissal of the claim and this Court's issuance of *Malesko*." (Pet. Brief at 16; emphasis added.) The timing of the decisions is irrelevant. The district court properly found, pre-*Malesko*, that a constitutional tort claim does not lie against a private company performing services for the federal government. The Fourth Circuit, post-*Malesko*, correctly affirmed the district court's decision. *Gantt*, 356 F.3d at 552. The result has been consistent throughout: Gantt does not have a constitutional cause of action against her employer, a private company. Thus, there is no conflict with *Malesko* warranting review by this Court.

Second, Gantt does not quarrel with the ruling in *Malesko* that *Bivens* does not apply to private companies. (Pet. Brief at 16.) Rather, Gantt "only asks that this Court acknowledge that [Security USA] is a government actor, allowing her to sue, as can a government employee, under the Equal Protection Clause of the Fourteenth Amendment." *Id.* However, under this Court's Rules, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. At best, Gantt's plea for this Court to "acknowledge that [Security USA] is a government actor" is merely an assertion that the Fourth Circuit made incorrect factual findings, or that the Fourth Circuit misapplied *Malesko*. Such assertions are not sufficient reasons to grant certiorari.

Third, Gantt's claim that this case is "distinguished" from *Malesko* is incorrect. (Pet. Brief at 16.) Rather, the opposite is true: this case is identical to *Malesko* on all material points. In *Malesko*, the plaintiff was a federal prisoner being held in a halfway house operated by a private company. 534 U.S. at 63-64. The use of private contractors to operate such facilities is extensive. *Id.* at 63 n.1. The private contractor at issue was subject to extensive government regulation and oversight. *Id.* at 71 n.5. The plaintiff, who suffered from a heart condition, had a special exemption from the company's requirement that all detainees below the fifth floor take the stairs to their rooms. *Id.* at 64. Notwithstanding the undisputed acceptance of the plaintiff's exemption among the company's managers, a particular supervisor disregarded the exemption and

ordered the plaintiff to take the stairs. The plaintiff had a heart attack and suffered injuries. *Id.* The plaintiff had an alternative remedy but missed the statute of limitations, and brought his *Bivens* claim as a last-ditch attempt to recover damages from the private company. *Id.* at 72. Gantt's case is identical: She alleges that Security USA is a government actor because of the widespread use of private companies to perform security functions and the extensive oversight by the Federal Protective Service; she alleges that an individual supervisor disregarded her exemption to the outside posting assignments; and she had an alternative, well-established remedy against her employer (Title VII), but missed the filing deadline. (*See* Pet. Brief at 15 n.2.) Rather than identify a conflict with *Malesko*, Gantt demonstrates that her case is the same as *Malesko*. Thus, the Fourth Circuit correctly relied on *Malesko* in dismissing her constitutional claim.

Finally, Gantt claims, without citation to authority, that lower courts are "currently unclear" as to how to apply *Bivens* following *Malesko*. (Pet. Brief at iv.) To the contrary, the courts of appeals seem to have no trouble applying the *Malesko* ruling and mandate that *Bivens* claims do not lie against private government contractors and that courts should be reluctant to imply causes of action where Congress has not specifically created them. *See, e.g., Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26, 33 (1st Cir. 2003); *John Street Leasehold, LLC v. Capital Management Resources, L.P.*, 283 F.3d 73, 75 (2d Cir.), *cert. denied sub nom. John Street Leasehold, LLC v. F.D.I.C.*, 537 U.S. 883 (2002); *Gantt v. Security USA, Inc.*, 356 F.3d 547, 552 (4th Cir. 2004); *Muick v. Glenayre Electronics*, 280 F.3d 741,

742 (7th Cir. 2002); *Sinclair v. Hawke*, 314 F.3d 934, 940-42 (8th Cir. 2003); *Libas, Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004).

Gantt offers no legitimate reason why this Court should grant certiorari in this case to revisit *Malesko*. Gantt's petition for certiorari should be denied.

## III. Gantt failed to properly raise and preserve her Fourteenth Amendment and § 1983 claims for appeal, thus they are not issues proper for review by this Court.

Gantt's attempt to raise the issue of Fourteenth Amendment liability for a private employer must fail, as Gantt failed to properly preserve that issue for appeal. The Fourth Circuit dismissed, in a footnote, Gantt's institution of a claim pursuant to the Fourteenth Amendment. The court stated

> On appeal, Gantt seeks to widen the legal basis of her constitutional claim, contending that she has alleged a "violation of the Fifth and Fourteenth Amendments of the Constitution, guaranteeing equal protection under the law pursuant to 42 U.S.C. § 1983." Brief of Appellant at 14. We must reject this contention. Not only has Gantt failed to invoke the Fourteenth Amendment or § 1983 in her complaint, but she has also failed to assert any facts in the complaint

> giving rise to Security USA's liability as a *state* actor. Rather, Gantt's case for *governmental action hinges on her* allegations that Security USA acted under color of *federal* law. Moreover, the arguments Gantt asserts in her appellate briefs would not establish state action, even if she had alleged the necessary underlying facts in her complaint.

*Gantt v. Security, USA, Inc.*, 356 F.3d 547, 552 n. 1 (4th Cir. 2004) (emphasis in original). Accordingly, it has been established that Gantt failed to properly raise this issue before the district court. It cannot be litigated for the first time on appeal. Therefore, even if the writ is granted, this issue has not been preserved for appeal and would not be properly before this Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). Simply put, the issue was raised too late. Certiorari should therefore be denied as to Gantt's Fourteenth Amendment and § 1983 claims.

## IV. Correction of perceived errors by the court of appeals does not provide a proper basis for review by this Court.

Even if the Gantt had properly raised and preserved its Fourteenth Amendment issue for review, she presents no reason why this Court should address that question, other than to correct alleged error in this particular case. Similarly, Gantt advances no compelling reason, other than the correction of a

perceived error in application of prior precedent concerning private entities as government actors for purposes of imposing Fifth Amendment liability. She simply has failed to provide a proper basis for granting certiorari on these issues. She has identified no error in the legal standard applied by the Fourth Circuit and does not claim that the standard is in conflict with any decision of this Court or the other courts of appeal. SUP. CT. R. 10. Gantt simply asks this court to expend its limited resources correcting alleged errors in the Fourth Circuit's application of the legal standard for liability of a private company under color of law to the particular facts of this case. First, no such errors exist on the record of this case, as the Fourth Circuit's opinion was decided correctly on the merits under all of Gantt's asserted theories of recovery. And second, it is not the function of this Court to engage in error correction in individual cases. *See Id.*

## V. Gantt's attempt to seek review by this Court of the Fourth Circuit's decision on the merits of her state emotional distress claims are inappropriate and certiorari should be denied.

Gantt seeks to have this Court review the decision of the Fourth Circuit concerning the merits of her state law emotional distress claim. However, her petition for certiorari does not identify any accepted basis for review of this decision. Rather, Gantt is simply asking this Court to substitute its judgment for that of the Fourth Circuit on a question of state law. First, a petition for writ of certiorari is "rarely granted when the asserted error consists of erroneous factual

findings ..." SUP. CT. R. 10. Such case specific error correction does not fall within this Court's certiorari jurisdiction. *See id.* More importantly, Gantt's emotional distress claims consist wholly of issues of state law. *See Gantt*, 356 F.3d at 552-56 (citing Maryland cases and statutes). No authority is proffered by Gantt for this request for invocation of Supreme Court supervisory power to review a matter of state law, and Security USA is aware of none "This Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the *federal* system." *Frasier v. Heebe*, 482 U.S. 648 (1987) (emphasis added). Because the integrity of the federal court system is not at risk in this case, this Court should deny certiorari.

## CONCLUSION

For the foregoing reasons, and specifically because Gantt offered no "compelling reasons" for this Court to exercise its discretionary power to grant a writ of certiorari, as required by Supreme Court Rule 10, and because the Court of Appeals correctly applied existing law to Gantt's claims, Gantt's request for a writ of certiorari should be denied.

Respectfully submitted,

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**Fifth Amendment to United States Constitution**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Fourteenth Amendment to United States Constitution**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.